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Supreme Court of the United States

OCTOBER TERM, 1950

No. 513

SAMUEL HOFFMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED JANUARY 25, 1951.

CERTIORARI GRANTED MARCH 12, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 10,308

UNITED STATES OF AMERICA

vs.

SAMUEL HOFFMAN, Appellant

Appeal from the Order of the District Court of the United States for the Eastern District of Pennsylvania. Miscellaneous No. 1404

Appendix to Brief of Appellant

[fol. 3] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

RELEVANT DOCKET ENTRIES

October 5, 1950. Petition to adjudge witness to be guilty of criminal contempt, filed. Hearing on petition to adjudge witness guilty of contempt. Eo die: The Court finds Samuel Hoffman guilty of contempt. Sentence: Imprisonment for five months. Order of court adjudging witness to be in contempt and commitment, filed. Commitment exit. Notice of appeal by Samuel Hoffman, filed 10/5/50. Copy to Max H. Goldschein. In open Court; Bail denied pending appeal. Clerk's statement of docket entries forwarded to U.S. Court of Appeals and copy filed.

October 20, 1950. Petition for reconsideration of allowance of bail pending appeal filed.

October 23, 1950. Transcript of hearing on October 3, 1950, filed. Transcript of hearing on October 4, 1950, filed. Transcript of hearing on October 5, 1950, filed. Hearing on motion for admission to bail C.A.V.. In open Court: Ordered that defendant be released in bail in sum of \$10,000, pending appeal.

October 24, 1950. Bond of defendant in sum of \$10,000 filed.

[fol. 4] IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENN-
SYLVANIA

In the matter of THE GRAND JURY, WITNESS SAMUEL
HOFFMAN

Criminal Contempt, Rule 42(a), Federal Rules of Criminal
Procedure

PETITION

Comes Max H. Goldschein, Special Assistant to the Attorney General of the United States and by direction of the Court respectfully presents:

That on the 14th day of September, 1950 the Grand Jury of the United States of America for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania, duly impaneled and sworn undertook an investigation concerning frauds upon and conspiracies to defraud the Government of the United States, involving violations of the Customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses.

In pursuance of such inquiry it became necessary for said Grand Jury to inquire into and ascertain the facts from various and sundry witnesses who appeared before said Grand Jury and testified, and others who have been and will be subpoenaed to appear and testify.

In accordance therewith, Samuel Hoffman was subpoenaed and appeared as a witness before said Grand Jury [fol. 5] on October 3, 1950 and there arbitrarily refused to answer certain questions propounded to him, claiming that his answers thereto may tend to incriminate him. Thereafter, on the same day he appeared with his counsel before the Honorable J. Cullen Ganey, United States District Judge for the Eastern District of Pennsylvania in open Court, where the claim of privilege of the said witness, Samuel Hoffman, was challenged by the Government. The Court heard the questions propounded to the witness and the answers he made thereto. The Court after hearing argument of counsel for the witness found that there was no real and substantial danger of incrimination to the said

witness, Samuel Hoffman, and ordered him to return before the Grand Jury and answer the said questions which he had refused to answer, namely:

1. Q. What do you do now, Mr. Hoffman?
A. I refuse to answer.
2. Q. Have you been in the same undertaking since the first of the year?
A. I don't understand the question.
Q. Have you been doing the same thing you are doing now since the first of the year?
A. I refuse to answer.
3. Q. Do you know Mr. William Weisberg?
A. I do.
Q. How long have you known him?
A. Practically twenty years, I guess.
Q. When did you last see him?
[fol. 6] A. I refuse to answer.
4. Q. Have you seen him this week?
A. I refuse to answer.
5. Q. Do you know that a subpoena has been issued for Mr. Weisberg?
A. I heard about it in Court.
Q. Have you talked with him on the telephone this week?
A. I refuse to answer.
6. Q. Do you know where Mr. William Weisberg is now?
A. I refuse to answer.

That on the 4th day of October, 1950 said witness, Samuel Hoffman, stated in open Court in the presence of his counsel that he would not obey the order of this Honorable Court and answer the questions that the Court directed him to answer as hereinabove set out. This refusal was made to Judge J. Cullen Ganey, presiding.

It is further shown to the Court that Samuel Hoffman, a witness before the said Grand Jury, has refused to answer the aforesaid questions propounded to him before said Grand Jury; that each of said questions was proper and material to the Grand Jurors' inquiry and that no one or all of said questions would tend to incriminate the said witness for a violation of a Federal Statute as has been adjudged by this Court.

It is, therefore, shown that the said witness, Samuel

Hoffman, has given obstructive and contumacious answers to each of the questions propounded to him before the said Grand Jury and he has willfully, deliberately and con-[fol. 7] tumaciously shut off the search for truth, thwarted the investigation of this Grand Jury in the matter herein-before set out, and obstructed the administration of justice.

That the said witness, Samuel Hoffman, has wilfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court in the direct presence of the Court by willfully and deliberately stating to the Court that he refused to obey the Order of this Court to answer before the Grand Jury the aforesaid questions.

It is, therefore, respectfully prayed that this Honorable Court invoke its punitive power against the said witness, Samuel Hoffman, to preserve the authority and vindicate the dignity of the Court, in order to maintain the proper functioning of the Court and the Grand Jury, and that this Honorable Court exercise its authority to punish for direct defiance of the Order of this Court and contempt thereof, and that its power to punish may serve as a deterrent to others who would defy the processes of this Court who may be inclined to obstruct the business of this Court and the Grand Jury.

M. H. Goldschein, Special Assistant to the Attorney General; Justinus Gould, Special Assistant to the Attorney General; Drew J. T. O'Keefe, Special Assistant to the Attorney General.

[fol. 8] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENNSYLVANIA

In the Matter of the Grand Jury WITNESS SAMUEL HOFFMAN
Criminal Contempt, Title 18, USC, Section 401, Rule 42(a)
Fed. Rules Crim. Proc.

ORDER OF CONTEMPT—October 5, 1950

In the matter of Contempt of Samuel Hoffman committed in open Court.

Whereas, on the third day of October in the Year 1950, in open Court and in the presence of the Judge thereof,

to wit, Judge J. Cullen Ganey, during the session of said Court and while the said Court was engaged in the regular business of hearing and determining causes pending before it, one Samuel Hoffman was guilty of misbehavior in the presence and hearing of said Court.

That the said Samuel Hoffman was subpoenaed and appeared as a witness before a Grand Jury of this Court on October 3, 1950, which Grand Jury was conducting an investigation concerning the violations of the criminal laws of the United States, and there refused to answer certain questions propounded to him, claiming that his answers thereto may tend to incriminate him. Thereafter, on the same day he appeared with his counsel before J. Cullen Ganey, United States District Judge for the Eastern District of Pennsylvania in open Court, where the claim of privilege of the said witness, Samuel Hoffman, was challenged by the Government. The Court heard the questions propounded to the witness before the Grand Jury and the [fol. 9] answers he made thereto. The Court after hearing argument of counsel for the witness found that there was no real and substantial danger of incrimination to the said witness, Samuel Hoffman, for a Federal offense and ordered him to reappear before the aforesaid Grand Jury and answer the above mentioned questions which he had refused to answer, namely:

1. Q. What do you do now, Mr. Hoffman?
A. I refuse to answer.
2. Q. Have you been in the same undertaking since the first of the year?
A. I don't understand the question.
Q. Have you been doing the same thing you are doing now since the first of the year?
A. I refuse to answer.
3. Q. Do you know Mr. William Weisberg?
A. I do.
Q. How long have you known him?
A. Practically twenty years, I guess.
Q. When did you last see him?
A. I refuse to answer.
4. Q. Have you seen him this week?
A. I refuse to answer.
5. (Q. Do you know that a subpoena has been issued for Mr. Weisberg?

A. I heard about it in Court).

Q. Have you talked with him on the telephone this week?

A. I refuse to answer.

[fol. 10] 6. Q. Do you know where Mr. William Weisberg is now?

A. I refuse to answer.

That on the fourth day of October in the Year 1950, the said Samuel Hoffman, stated in open Court and in the presence of his counsel that he would not obey the Order of this Court and answer the questions which the Court directed him to answer as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice.

That, therefore, the said Samuel Hoffman has willfully, deliberately and contumaciously disobeyed and resisted the lawful Order and command of this Court by refusing to answer the aforesaid questions before the Grand Jury.

And, therefore, the said Samuel Hoffman was guilty of a contempt of this Court by misbehavior in its presence and by a forcible resistance in the presence of the Court to a lawful Order thereof in the manner aforesaid:

Now, therefore, be it Ordered and Adjudged by this Court that the said Samuel Hoffman by reason of said acts was and is Guilty of Contempt of the authority of this Court committed in its presence on the third day of October, in the Year 1950.

And it is further Ordered that the said Samuel Hoffman be punished for said contempt by undergoing imprisonment for five (5) months.

And it is further Ordered that this Judgment be executed by Samuel Hoffman in — until the further Order of this Court, but not to exceed 5 months.

[fol. 11] And it is further Ordered that a certified copy of this Order under the Seal of the Court be process and warrant for executing this Order.

Dated October 5, 1950.

J. Cullen Ganey (S.), District Judge.

[fol. 12] IN UNITED STATES DISTRICT COURT

EXCERPT FROM TESTIMONY OF HEARING ON OCTOBER 3, 1950
(pages 76-77).

Mr. Gray: Will Your Honor allow the record to note—so that it won't be necessary for him to go back and say that he declines to answer on the ground that it might incriminate him of a Federal offense—that Your Honor's opinion is upon the assumption that that answer appears, otherwise it is necessary for him to go back and be brought back before Your Honor again.

The Court: I see no objection to that being put on the record.

Mr. Gray: You see no objection to that?

Mr. Goldschein: No.

[fol. 13] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

PETITION FOR RECONSIDERATION OF ALLOWANCE OF BAIL
PENDING APPEAL

The petition of Samuel Hoffman, by his attorneys, Gray, Anderson, Schaffer & Rome, respectfully represents:

1. Petitioner was subpoenaed to appear and testify before the Special Grand Jury sitting in the Eastern District of Pennsylvania.
2. In response to said subpoena, petitioner appeared on September 14, 1950.
3. On October 3, 1950, your petitioner was called as a witness, and testified inter alia, as set forth in Exhibit "A", attached hereto and made part hereof.
4. Thereafter, on October 4, 1950, your petitioner was summoned before the Court and persisted in his refusal to answer the said questions on the ground that he might incriminate himself as to a federal offense.
5. Upon presentment for contempt, your petitioner was found guilty and sentenced to a term of five months on October 5, 1950.
- [fol. 14] 6. Your petitioner was committed to the County

Prison and is presently at Moyamensing Prison in Philadelphia.

7. Your petitioner believes and therefore avers, that on the basis of the facts contained in his affidavit, attached hereto and marked Exhibit B, he was justified in his refusal to answer the questions as aforesaid, or, in any event, that there is so substantial a question involved that your petitioner should be released on bail pending the determination of that question by the Court of Appeals for the Third Circuit to which your petitioner has appealed.

Wherefore, your petitioner prays that he be released on bail pending his aforesaid appeal.

Gray, Anderson, Schaffer & Rome, by (S.) Wm. A.
Gray, Attorneys for Petitioners.

[fol. 15] EXHIBIT "A" TO PETITION

1. Q. What do you do now, Mr. Hoffman?
A. I refuse to answer.
2. Q. Have you been in the same undertaking since the first of the year?
A. I don't understand the question.
Q. Have you been doing the same thing you are doing now since the first of the year?
A. I refuse to answer.
3. Q. Do you know Mr. William Weisberg?
A. I do.
Q. How long have you known him?
A. Practically twenty years, I guess.
Q. When did you last see him?
A. I refuse to answer.
4. Q. Have you seen him this week?
A. I refuse to answer.
5. Q. Do you know that a subpoena has been issued for Mr. Weisberg?
A. I heard about it in Court.
Q. Have you talked with him on the telephone this week?
A. I refuse to answer.
6. Q. Do you know where Mr. William Weisberg is now?
A. I refuse to answer.

[fol. 16]

EXHIBIT "B" TO PETITION**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENNSYLVANIA****[Title omitted]****AFFIDAVIT****COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:**

Samuel Hoffman, being duly sworn according to law, deposes and says the following:

1. He is the petitioner in the foregoing petition for the allowance of bail.
2. He assumed when he refused to answer the questions involved before the Grand Jury, that both it and the Court were cognizant of, and took into consideration, the facts on which he based his refusals to answer.
3. He has since been advised, after his commitment, that the Court did not consider any of said facts upon which he relied and, on the contrary, the Court considered only the bare record, as contained in Exhibit A, attached to said petition.
4. In the interest of justice and particularly in aid of a proper determination of the above petition, he submits the following in support of his position that he genuinely feared to answer the questions propounded:

[fol. 17] (a) This investigation was stated, in the charge of the Court to the Grand Jury, to cover "the gamut of all crimes covered by federal statute". (See appendix 1)

(b) Affiant has been publicly charged with being a known underworld character, and a racketeer with a twenty year police record, including a prison sentence on a narcotics charge. (See appendix 2)

(c) Affiant, while waiting to testify before the Grand Jury, was photographed with one Joseph N. Bransky, head of the Philadelphia office of the United States Bureau of Narcotics. (See appendix 3)

(d) Affiant was questioned concerning the whereabouts of a witness who had not been served with a subpoena and for whom a bench warrant was sought by the Government prosecutor. (See appendix 4)

5. On the basis of the above public facts as well as the facts within his own personal knowledge, affiant avers that he had a real fear that the answers to the questions asked by the Grand Jury would incriminate him of a federal offense.

And further affiant sayeth not.

(S.) Samuel Hoffman.

Sworn to and subscribed before me this 19th day of October, 1950, A. D. (S.) Nettie E. Smith, Notary Public. My com. expires Feb. 7, 1951.

9/17/58 Gambler Called In Racket Probe

Cappy Hoffman Among First Three Witnesses

Samuel (Cappy) Hoffman, a gambler with a 20-year police record, and two other witnesses were summoned today before the federal grand jury investigating rackets here and in nine nearby counties.

All three appeared at the Federal Building in answer to subpoenas and waited while U. S. District Judge J. Cullen Ganey swore in the 19 jurors and delivered his charge.

The court told the jurors that the rackets they have been called to investigate are "a blight" that could destroy "the democratic process, the American way of life."

Hoffman and the two other witnesses were still waiting when Max H. Goldschein, special deputy attorney general who is directing the probe, took the jurors to their third floor headquarters.

Attorney Comes Along

The other waiting witnesses were Harry Segal, of Florence av. near 56th, and Samuel Lit, of Pine st. near 48th. Goldschein said they and Hoffman would be questioned about gambling. Hoffman and Segal were accompanied by Lester Schaffer, an attorney from the office of William A. Gray.

Levi C. Hershey, a grocer of Elizabethtown, Lancaster County, was named the jury foreman. Dr. Herman G. Nailor, of 425 W. Chelten av., a dentist, was named deputy foreman. The jury was chosen from a panel of 34. Fifteen were excused.

Hoffman's record includes a conviction and prison sentence on narcotics charges, an acquittal for

Continued on Page 18, Col. 3

Gamblers Called in Probe

Continued from First Page

murder, and innumerable arrests on gambling charges.

His early operations were out of Atlantic City and he was once described by top Philadelphia police officials as "the king of the shore rackets who lives by the gun."

Named With Nig Rosen

More recently they named him and Nig Rosen as two of the men trying to "organize" the numbers racket in this area. Last August, the Senate crime investigating committee put Hoffman's name on a list of "known gangsters" from the Philadelphia area who made the Sands Hotel, Miami Beach, their headquarters.

Hoffman's murder acquittal was in 1942 at Mays Landing. A jury found him not guilty of the murder of Michael Tenerelli, alias Mickey Blair, a former fighter, who was shot six times in the back outside his Pleasant Bay Inn in Atlantic City. Hoffman charged he was "framed."

Solemn Duty

In his charge, Judge Ganey told the jurors:

"You have been called to the performance of what I feel is a very solemn duty. You have been singled out of the electorate of this district to look into certain matters which the attorney general will bring to your attention.

"In the hurly-burly of life and its complex economic, financial and political complexities, we overlook the structure which holds up this great system of our American way of life. Too often we forget that it is on this structure that all of the very many fine things which we enjoy today are predicated.

"Our democratic process is the envy of the world. Here all men appear before the court free and equal, no matter what their rank

their situation in life, their birth. We are one of the few cases in the world where liberty and freedom are really concrete measures which each of us can utilize to bring to the fulfillment of our every wish and event want; and it is important that the wellsprings of the democratic process be kept intact, pure and undefiled.

Rackets a 'Blight'

"We must not let infiltrate into the democratic process anything which will harm or degrade it, and see to it that it is kept vigorous and alive.

"If rackets infest or encrust our system of government, just as any blight attacks any other growth, it withers and dies. The wellspring of the democratic process will also dry up.

"They (rackets) do not serve the wishes and wants and intents of the democratic process, the American way of life.

"For that reason, the attorney general's office has come into this district to conduct an investigation on the conditions that prevail here. I do not know the exact form of the investigation will take. I do know the conduct of the grand jury in-

vestigation will run the gamut of all crimes covered by federal statute.

"Therefore there descends upon your shoulders a rather solemn duty. I don't think that there is any responsibility that carries a greater dignity than sitting in judgment of your fellow man. It is your duty to take this keenly, be alert about it, and give it your best."

Judge Ganey described the duties of a grand jury and what its limitations were, explaining that the result of its investigation would be either indictments, a report, or neither.

Goldschein said that the investigation will include allegations made against one GI school and veterans attending another.

In the one case, Goldschein said, the grand jury will look into reports that a GI school, with only 60 veterans attending, was receiving monthly government checks for the tuition of 380.

Veterans Face Charges

In the other, Goldschein added, the grand jury will hear testimony from witnesses who allege that a large number of veterans attending a GI school spent only five minutes there each day to report themselves present and then left.

In this case the grand jury will examine the possibility of bringing charges against the veterans who were receiving subsistence allotments from the Government.

The investigation is to run the full gamut of all the rackets, including illegal drugs, bootlegging, gambling, smuggling, white slavery, and their offshoots.

Goldschein said that 20 subpoenas were in the first batch to go out, but that nine of these remain unsworn. "We are having trouble finding some big shots," he said.

Others Listed

The other members of the grand jury are:

Charles R. Allabach, 3436 Princeton av., insurance agent; Mrs. Anna L. Dill, 407 E. Wadsworth st., housewife; Mrs. Floy M. Edson, Bethlehem, housewife; Harry V. Farrall, 5537 Greenway av., retired; Mrs. Marion V. Hansell, Mechanicsville, Bucks County, housewife; Leonard Hatfield, Pottstown, dealer; Miss Evelyn M. Hayi, 1716 Spruce st., cosmetician.

Mrs. Eva S. Hess, Collegeville, housewife; Mrs. Anna M. Keller, Denver, Lancaster County, housewife; Mrs. Gertrude McLeod, 1908 N. 22d st., dressmaker; Mrs. Georgia W. Potter, 105 W. Willow Grove av., housewife; Archie T. Richards, 810 Prospect st., Prospect Park, retired; Mrs. Marie K. Selby, Alden Park Manor, Germantown, housewife.

Edward P. Stevenson, 136 W. Mt. Airy av., clerk; John J. Weidemeyer, 811 W. Huntingdon st., machinist; Mrs. Anna M. Wendell, 205 Comly st., housewife, and Mrs. Mildred J. Williams, 662 Arbor road, Yeadon, housewife.

^{10/14/50} Hoffman Faces Contempt Action

Balks at Questioning In Racket Inquiry

Samuel (Cappy) Hoffman faces contempt of court proceedings today unless he has a change of heart about answering questions before the federal grand jury investigating rackets here.

Hoffman, long known to police as an underworld character, has been ordered to appear before U. S. Judge J. Cullen Ganey if he persists in refusing to answer.

His attorney, William A. Gray, indicated that Hoffman will continue to refuse to do so on the grounds of possible self-incrimination.

Runs Risk of Jail

If Hoffman is cited for contempt, he may be jailed. It would be the first contempt charge brought against any of the more than 30 witnesses who have appeared so far in 14 days before the grand jury.

At the request of Max H. Goldschein, federal prosecutor, Judge Ganey yesterday ordered Hoffman to answer the questions. They involved William Weisberg, of 50th st. near Spruce, one of a number of witnesses for whom Goldschein has asked body attachments because their whereabouts are unknown and they cannot be served with subpoenas.

The questions asked Hoffman were: "What do you do now? Have you been in the same business since the first of the year? Do you know Mr. Weisberg? When did you see him last? Have you seen him this week? Have you talked to him on the telephone? Do you know his whereabouts?"

He Fails to Return

As Hoffman left the grand jury anteroom yesterday after being ordered by Judge Ganey to answer the questions, some of his friends, also witnesses before the grand jury, asked him if he would return after the noon recess.

"I'll most likely be in jail tomorrow," Hoffman said angrily. "Why should I spend my afternoon here?" He did not return.

Hoffman's police record includes a prison sentence on a narcotics charge, an acquittal on a murder charge, and numerous arrests for gambling.

Two central city ticket brokers were subpoenaed to testify before the grand jury. They are Philip Glassman and his brother, Oscar.

Philip has a ticket brokerage business on Sansom st. near 15th and operates a taproom at that address. He is also active as a sports promoter. Oscar operates a ticket business on 13th st. near Locust.

U. S. Will Cite Hoffman for Court Contempt

Witness Tells Judge He Won't Tell Probers What His Business Is

Samuel (Cappy) Hoffman, long known to police as an underworld character, refused for a second time today to answer questions put by a federal grand jury investigating rackets here.

Max H. Goldschein, federal prosecutor in charge of the probe, announced that a formal charge of contempt of court will be lodged against Hoffman at 10:30 A. M. tomorrow.

It will be the first time since the jury began its work September 14 that a formal contempt citation has been made against a witness.

Won't Tell About Work

The questions Hoffman refused to answer dealt with the way in which he earns a living and with his possible connection with William Weisberg, one of a number of witnesses for whom Goldschein has asked body attachments because their whereabouts are unknown.

Hoffman, accompanied by his attorney, William A. Gray, appeared today before Judge J. Cullen Ganey.

"I have explained to my client that if he should fail to answer he would be held in contempt," Gray told the court. "He told me he would refuse to answer on the ground it might incriminate him."

Questioning Called Unfair

"That is right," Hoffman interjected.

Gray argued that it was unfair to require Hoffman to answer questions about his business.

"If a man were a counterfeiter and he was asked what his business was, he would be incriminating himself by saying he was a counterfeiter," Gray said.

Racket Witness Balks at Queries

Cappy Hoffman Told By Judge to Answer

Samuel (Cappy) Hoffman, known for many years as an underworld character, was brought before Federal Judge J. Cullen Ganey today for refusal to answer questions put by the special rackets grand jury.

Ganey ordered Hoffman to answer, but William A. Gray, attorney for Hoffman, indicated that his client might persist in his refusal.

"I will consult my client, and if he persists in not answering, I will notify your honor," Gray told the court.

Hoffman's criminal record includes a prison sentence on a narcotics charge, an acquittal on a murder charge and numerous arrests for gambling.

Fears Self-Incrimination

The questions Hoffman refused to answer involved William Weisberg, of 50th st. near Spruce, one of eight witnesses for whom Max H. Goldscheln, federal prosecutor, has asked body attachments, on the ground that their whereabouts are unknown and they cannot be found for the service of subpoenas.

The questions asked Hoffman were: "What do you do now? Have you been in the same business since the first of the year? Do you know Mr. Weisberg? When did you see him last? Have you seen him this week? Have you talked to him on the telephone? Do you know his whereabouts?"

The refusal to answer was based on the possibility of self-incrimination. Judge Ganey ruled that the questions involved no such risk for Hoffman.

Gray argued that it was improper to ask one witness the whereabouts of another. The line of questioning directed at Hoffman, Gray said, might eventually involve income tax matters and expose his client to self-incrimination.

Judge Ganey set Thursday at 10 A. M. for a hearing on an application by Goldscheln for body attachments for two witnesses; Joseph Gergenti, of Randolph st., Camden, and Joseph Coffey, of Marion st., near Reed.

A body attachment is similar to a bench warrant, except that when an attachment is issued, the person named cannot be freed under bail, as he can be under a bench warrant.

APPENDIX 3 to AFFIDAVIT

THE SUNDAY BULLETIN, PHILADELPHIA, SUNDAY MORNING, SEPTEMBER 24, 1939

Racket Witnesses Wait and Wait (And Get the Willies) at \$4 a Day



Samuel (Cappy) Hoffman (left), erstwhile bigtime gambler, is one of Uncle Sam's involuntary \$4-a-day consultants at the grand jury racket investigation. He's passing the time chatting (apparently in a sort of "who me?" vein) with Joseph N. Bransky, head of local U. S. Bureau of Narcotics.

EVENING BULLETIN 9/29/53

8 U.S. Warrants Asked in Probe

Men Wanted in Racket Quiz Can't Be Found

Max H. Goldschein, special federal prosecutor of the rackete probe here, today sought bench warrants for eight men on whom he has been unable to serve subpoenas for grand jury appearance.

William A. Gray, appearing as attorney for some of the eight men, objected to issuance of the warrants on the ground that they would be improper unless the men sought had first been served with subpoenas and had refused to honor them.

Judge J. Cullen Ganey took the issue under advisement.

Goldschein told the court he wanted warrants for eight who were subpoenaed ten days ago "and whose whereabouts are still unknown."

Gray Intervenes

Gray immediately intervened. He did not name his clients but said that he had represented some of the men sought in the past and wanted to defend their rights.

"It has never been known for a court to issue an attachment for a man who has not actually been served," Gray said. "Just because Mr. Goldschein says he cannot find a man, it doesn't mean that the man is evading him, nor is it grounds for 'bench warrant.'

Ganey commented that the Gray argument had "a lot of merit." Ganey instructed Goldschein to prepare formal petitions for the bench warrants. The judge said he would rule when the petitions were submitted, adding that "the reasons for them must be substantial before they are allowed."

8 Bench Warrants

The eight issued by Goldschein for warrants are:

James Singleton, for whom two addresses were given—Hollywood st. near Federal and Fitzgerald st. near 29th; Joseph Coffey, of Manton st. near 16th; three brothers, Michael and Salvatore Matteo, of Manton st. near 4th, and Frank Matteo, of Clover lane, Upper Decatur; William Weisberg, of 50th Street Spruce; Joseph Gergenti, of Randolph st., Camden, and Michael Switz, of Waverly st. near 25th.

The application for the warrants came shortly after Frank "Pinky" Palermo sought a court order to quash a subpoena requiring him to testify before the grand jury.

Palermo, publicly tagged by police as the city's "numbers king," was the first of 28 witnesses to resist testifying before the grand jury.

Early in the probe, which began September 14, several declined to answer questions put by the investigating staff until they had been ordered to do so by Federal Judge J. Cullen Ganey, but none sought to nullify a subpoena.

Contested Name Left Disclosed

Through his attorney, Jacob Kosman, Palermo filed a petition asking the court to quash and set aside his subpoena on the ground that it "does not disclose the name or names of the persons against whom the inquiry is instituted nor the subject of the investigation."

Kosman said the subpoena, made on a postal card, is headed "U. S. vs. Grand Jury."

"Under the law," Kosman said, "any subpoena compelling a witness to appear before a grand jury must disclose the name or names of persons against whom the investigation is instituted, or the subject of the investigation. I suppose we are supposed to know from the newspapers why our man is supposed to appear, but that is not the law."

Goldschein argued in opposition to the Kosman petition that the right of the grand jury to summon witnesses without naming the defendants in the probe is well established. Ganey set Tuesday for the submission of briefs on the issue.

He's Waited Since Tuesday

Palermo was on hand in the Federal Building today in answer to the subpoena that has required him to appear daily since last Tuesday.

Palermo was arrested earlier this month, along with Singleton and Coffey, as the aftermath of a bloodless gun battle reportedly stemming from a numbers racket dispute. The charges against them were dismissed when no witnesses appeared to testify.

Clarence J. Malehorn, of Phoenix-

ville, who with his brother operates a wire communication service in Camden, was brought before Judge Ganey by Goldschein after he refused to answer questions put to him by the grand jury. The questions dealt with the telephonic equipment maintained by Malehorn at his Camden headquarters.

Ganey told Malehorn the answers to such questions could not incriminate him. Malehorn replied that "I have no guarantee the answers would not be made public." He maintained that stand after Ganey told him that grand jury proceedings were secret and no testimony would be made public.

Ganey instructed Malehorn to appear in court with his attorney for an official ruling later today.

[fol. 23] Supplemental Appendix to Brief of Appellant

EXCERPT FROM TRANSCRIPT OF HEARING, OCTOBER 4, 1950

(P. 87). Mr. Gray: * * * Before that is done, while Your Honor was, and you always are, sir, extremely patient in listening to the presentation I made yesterday in the matter, I would like to emphasize one fact that I put yesterday to Your Honor, and that is when this man was asked what was his business, I argued to Your Honor that he would have the right to refuse to answer on the ground that it might incriminate him of a Federal offense. I now put the hypothetical question to Your Honor, suppose this man was engaged in counterfeiting?

If he answers the question, he answers it truthfully, and if he does not answer it truthfully, he will be subjected to the penalties of perjury. If he answers it truthfully, he certainly is incriminating himself of having been guilty of an offense under the United States Law.

The Court: What do you say to that, Mr. Goldschein?

Mr. Goldschein: I say that is like saying that a man who breaks into a bank and steals the money does not have to file an income tax return because he might say that he stole the money; or the man who says he does not have to answer whether he ever used the mail, because it may be presumed that he had at some time used the mail to defraud; that he did not have to answer whether or not he ever wrote a letter to John Doe or Bill Smith, because there may have [fol. 24] (P. 88) been something in that letter that is not true, and he may have violated the statutes with relation to mail fraud.

No, may it please the Court, I don't think that any witness can stand before the Grand Jury and say that he refuses to answer a question that is as simple and as plain as that one, and have the Court read into it the fact that he refuses to answer the question because he may have violated some Federal statute.

Mr. Gray: I don't think that is a parallel—

Mr. Goldschein: I think, may it please the Court, that before a witness can be given privilege against self-incrimination that the obvious answer to the question must be such that the Court can determine from the question, if the question is answered in the affirmative, that it would in-

erminate him. Other than that, the witness must give the Court sufficient so that the Court can determine.

The Court: Yes, I think that is right. I ask, what is your job—

Mr. Gray: May I say, before that—

The Court: Excuse me, Mr. Gray. That may be laid in an environment and under such circumstances from which the only inference that can be drawn—I cannot say that he is a counterfeiter—I think I have the right to presume he is engaged in a lawful occupation.

(P. 89) Mr. Gray: My friend does not answer the question and Your Honor does not answer it. Suppose the man is in the counterfeiting business. He is asked the [fol. 25] question, What is your business?

He knows he is a counterfeiter; it is his only business; he cannot answer the question because it would incriminate him. What can he say? He cannot say, "I refuse to answer the question because I am in the counterfeiting business, or I refuse to answer the question because it might incriminate me under the Federal laws; he happens to be a counterfeiter. What are you going to do about that?

~~The Court. I know, but the whole background I think it must be laid in a background from which the Court can glean that he is in the counterfeiting business. The mere asking of the question, "What business are you in?"~~

Mr. Gray: Well, he is in the counterfeiting business.

The Court: —does not warrant the assumption that he is in the counterfeiting business. He may be in the counterfeiting business. I have to go one step further, don't I, and make the assumption, don't I, that he is in the counterfeiting business or may be—

Mr. Gray: No, not at all. He is actually in the counterfeiting business. He is actually in the business.

(P. 90) The Court: I don't know that.

~~Mr. Gray: You don't know that, but he knows it in his own mind. How is he going to do more than say, "I refuse to answer on the ground that it may incriminate me"? He cannot explain that he is in the counterfeiting business, and [fol. 26] that is why it would incriminate him, because he is then incriminating himself.~~

The Court: All right, let us take myself. Suppose I were summoned before the Grand Jury; they say, "What is your business?" I say, I refuse to answer on the ground of self-incrimination.

Mr. Gray: Your illustration—

The Court: I don't know. I don't know what Hoffman does.

Mr. Gray: Your illustration is not very good. It has been broadly published that this man has a police record—

The Court: I don't know it.

Mr. Gray: —that he is not a character that belongs on the bench, or a character that belongs at the bar.

The Court: That I really don't know.

Mr. Gray: Wait; that is no answer to the fact that he may be in the counterfeiting business, and being in the counterfeiting business, if he makes any other explanation (P. 91) than refusal to answer on the ground that it may incriminate him—

The Court: You say it is widely known—has it been in the newspapers that he is in the counterfeiting business?

Mr. Gray: No, sir.

The Court: I am going to sustain—

[fol. 27] Mr. Gray: Will Your Honor allow this argument to be made of record the same as yesterday?

The Court: Yes, sir; yes, indeed.

Mr. Gray: Will Your Honor allow something else to be placed on record? I don't know that it is there—that there has been a subpoena issued for Weisberg some several weeks ago and that he has not appeared in answer to the subpoena?

The Court: If that is the fact.

Mr. Goldschein: Those are facts.

[fols. 28-29] UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 10,308

UNITED STATES OF AMERICA

vs.

SAMUEL HOFFMAN, Appellant

ORDER AS TO BRIEFS AND APPENDICES—October 25, 1950

Present: Biggs, Chief Judge, and Kalodner, Circuit Judge

It is Ordered that the parties in the above-entitled case be, and they are hereby granted leave to file typewritten briefs and appendices.

It is further Ordered that the case be set down for oral argument on November 6, 1950.

By the Court, Kalodner, Circuit Judge.

October 25, 1950.

[File endorsement omitted.]

[fol. 30] IN THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

[Title omitted]

MOTION BY THE UNITED STATES OF AMERICA TO STRIKE FROM
THE RECORD ON APPEAL THE APPELLANT'S PETITION IN THE
DISTRICT COURT FOR RECONSIDERATION OF ALLOWANCE OF
BAIL—Filed November 3, 1950

The United States of America moves that the Appellant's Petition for Reconsideration of Allowance of Bail pending appeal, be stricken from the record on appeal, and for cause shows:

1. That on October 5, 1950, the Appellant, Samuel Hoffman, was found Guilty of Criminal Contempt and sentenced by the United States District Court for the Eastern District of Pennsylvania to imprisonment for a term of five months.
2. That on the same day, October 5, 1950, the attorney for the said Samuel Hoffman made a Motion for bail pending appeal, which Motion was denied by the Court below.
3. That on the same day, October 5, 1950, the said Samuel Hoffman, appealed to this Court, and on October 6, 1950, the entire record of the proceedings in the Court below were sent to this Court and were accepted for docketing on ~~October 11, 1950 after the said Appellant had paid the requisite fee to the Clerk of this Court.~~
4. That, thereafter, on October 20, 1950, the said Samuel Hoffman filed in the District Court a Petition for Reconsideration of Allowance of Bail pending appeal.
5. On October 23, 1950, the ~~United~~ States District Court ordered that the Defendant, the said Samuel Hoffman, be released on bail in the sum of \$10,000.00, pending appeal.
6. Thereafter, on ~~October 24, 1950, a so-called "Supplemental Record", consisting of the Appellant's "Petition~~

for Reconsideration of Allowance of Bail" pending appeal together with Exhibits, Affidavit and additional docket entries were filed in this Court.

7. That such so-called "Supplemental Record" is not a part of the record on appeal, pertaining to the appeal and should not have been transmitted to this Court nor made a part of these proceedings, because it was not offered nor considered by the District Court in the consideration of the merits of the cause, and was considered by the Court below for only one purpose, namely, bail pending appeal, and after the appeal had been taken and after the entire record had been filed in this Court.

[fol. 32] Therefore, the United States of America moves that the so-called "Supplemental Record" consisting of the Defendant's Petition for Reconsideration of Allowance of Bail Pending Appeal, together with its accompanying exhibits and affidavit and with the additional docket entries be stricken from the records of this Court; as such so-called "Supplemental Record" is not a proper part of the Record on Appeal.

M. H. Goldschtein, Special Assistant to the Attorney General; Justinus Gould, Special Assistant to the Attorney General; Drew J. T. O'Keefe, Special Assistant to the Attorney General; Vincent P. Russo, Special Assistant to the Attorney General, Attorneys for the United States of America, Appellee.

[fol. 33] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER GRANTING MOTION TO STRIKE—December 8, 1950

Upon consideration of the motion by appellee to strike from the record on appeal appellant's Petition in the District Court for reconsideration of allowance of bail, and after hearing on the motion,

It is Ordered that the said motion be, and it is hereby granted.

By the Court, Herbert F. Goodrich, Circuit Judge.
December 8, 1950.

[File endorsement omitted.]

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT

No. 10,308

UNITED STATES OF AMERICA,

v.

SAMUEL HOFFMAN, Appellant

Appeal from the United States District Court for the
Eastern District of Pennsylvania

Argued November 6, 1950

Before Goodrich, Kalodner, and Hastie, Circuit Judges

OPINION OF THE COURT—Filed December 8, 1950By HASTIE, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania adjudging the appellant, Samuel L. Hoffman, guilty of criminal contempt, and sentencing him to imprisonment for five months.

The issue raised is whether the appellant was privileged to refuse to answer certain questions put to him by a federal grand jury on the ground that his answer might incriminate him of a federal offense.

The grand jury in question was duly impaneled and sworn on September 14, 1950, and thereupon undertook an "investigation concerning frauds upon and conspiracies to defraud the Government of the United States, involving [fol. 35] violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses."¹

¹ This exact statement was placed before the district court in the government's petition to cite the appellant for contempt filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

Pursuant to subpoena issued by this jury, the appellant, Hoffman, appeared as a witness on October 3, 1950. He refused to answer certain questions propounded to him by the grand jury on the ground that his answers might incriminate him of a federal offense.² Subsequently, he appeared before the district court where the claim of privilege was challenged by the government. The court heard the questions propounded to the witness and the answers he made thereto. After hearing argument of counsel for the witness, it found that the witness had been subjected to no real and substantial danger of incrimination for a federal offense, and ordered him to reappear before the grand jury and answer the questions which he had theretofore refused to answer.

The appellant stated in open court and in the presence of his counsel that he would not obey this order. The court thereupon found him guilty of contempt of court by wilful disobedience of its lawful order constituting misbehavior in its presence, and sentenced him.³

The only issue before us on this appeal is whether the appellant's claim of privilege was properly overruled.

The questions and answers in issue fall into two groups. The first concerns appellant's occupation, and is as follows:

[fol. 36] "1. Q. What do you do now, Mr. Hoffman?
 A. I refuse to answer."
 "2. Q. Have you been in the same undertaking since the first of the year?
 A. I don't understand the question.
 Q. Have you been doing the same thing you are doing now since the first of the year?
 A. I refuse to answer."

² The government's petition alleged that his refusal was made on the basis that the answers "might tend to incriminate him". In course of argument, the appellant was apparently allowed to take issue with this orally and assert by way of unwritten answer that he claimed the answers "might incriminate him of a federal offense".

³ The various proceedings before the court leading to the sentence actually occurred on three different days. But this is of no importance to the result.

The second concerns appellant's knowledge of the whereabouts of one William Weisberg, and is as follows:

"3. Q. Do you know Mr. William Weisberg?

A. I do.

Q. How long have you known him?

A. Practically twenty years, I guess.

Q. When did you last see him?

A. I refuse to answer."

"4. Q. Have you seen him this week?

A. I refuse to answer."

"5. Q. Do you know that a subpoena has been issued for Mr. Weisberg?

A. I heard about it in Court.

Q. Have you talked with him on the telephone this week?

A. I refuse to answer."

"6. Q. Do you know where Mr. William Weisberg is now?

A. I refuse to answer."

The appellant's claim of privilege not to answer these questions is based on the provision of the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself . . .".⁴ It was observed very early, however, that the interest of the United States in the testimony of every citizen foreclosed an unbridled application of the privilege. See *United States* [fol. 37] v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,694, 38, 39 (1807). Whatever conflict there was in the application of the two interests was thought to have been resolved by Chief Justice Marshall's enunciation of the now famous test: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be." *United States v. Burr*, *supra*, 39; see *Mason v. United States*, 244 U. S. 362, 364 (1917); *Camarota v. United States*, 111 F. 2d 243, 245 (3rd Cir. 1940). It is not disputed that this prohibition applies to proceedings before a grand jury of the United States.

⁴ U. S. Const. Amend. V.

Counselman v. Hitchcock, 142 U. S. 542 (1892), *United States v. Monia*, 317 U. S. 424 (1943).

A

The first of two situations where dispute is likely to occur over the application of the Marshall rule is illustrated by the questions directed to appellant with regard to the whereabouts of William Weisberg. It is not claimed by the appellant that the answers to the questions will in themselves incriminate him, but only that they expose him to danger in that they, in conjunction with other information, may lead to revelation that appellant is guilty of a federal offense. The reality of this danger is the matter in dispute upon which the privilege depends.

Where the risk is made apparent and appears substantial, the constitutional proscription has been held applicable. But in cases where the danger is not obvious, decision has depended upon the degree of likelihood of linkage between the probable answer and a crime. E.g., *United States v. Weisman*, 111 F. 2d 260 (2nd Cir. 1940); *United States v. Rosen*, 174 F. 2d 187 (2nd Cir. 1949); *United States v. Zwillman*, 108 F. 2d 802 (2nd Cir. 1940). It may well be [fol. 38] that no more helpful generalization of the degree of likelihood required can be devised than Judge Learned Hand's often quoted statement: ". . . perhaps in the end we should say no more than that the chase must not get too hot; or the scent, too fresh." *United States v. Weisman*, *supra*, 263.

We do not think appellant's admission that he had seen Weisberg within the week, or had talked to him within the week, or that he knew where he was, or a statement when he last saw him, could come dangerously close to involving him in a federal offense. We cannot see that any answer to this would be likely to differentiate appellant at all or in any significant way from a considerable number of blameless people. It was suggested that he would perhaps be subject to punishment for obstructing justice, pursuant to Sections 371 or 1501 of the Criminal Code.⁵ The sole basis

⁵ Section 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States or to defraud the United

for this claim is the fact, widely publicized, and known to the witness that a subpoena had been issued but not served requiring Weisberg to appear before this grand jury. However, the relationship between possible admissions in answer to the questions asked appellant and the proscription of those sections would need to be much closer for us to conclude that there was real danger in answering. In the [fol. 39] nature of this problem, analogical comparison of cases is difficult. However, we think it worth noting that any possible answers would, in our judgment, have come no closer to connecting appellant with wrongdoing than the answers which were required by this court in *Camarota v. United States, supra*.

B

A more difficult problem arises in applying to the first group of questions⁶ concerning the business of the witness the accepted generality of the Marshall test. It is perfectly

States, or any agency thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 1501. Assault on process server

"Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States, or United States commissioner; or

"Whoever assaults, beats, or wounds any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process—

"Shall, except as otherwise provided by law, be fined not more than \$300 or imprisoned not more than one year, or both."

⁶ Actually, the first question is the crucial one. The two questions asked thereafter are significant only in the light of the incriminatory possibilities of the answer to the first.

obvious that the questions here permit of direct answers which in themselves would be an admission of federal crime. Appellant has invoked that possibility in his assertion that a statement of "what he does" would tend to incriminate him "on the ground that it would incriminate him of a federal offense". Since the question asked permits an answer admitting federal crime, appellant urges that the court must accept this general assertion of crimination and that further inquiry whether he is in fact engaged in such illegal business is foreclosed. Literally construed Marshall's dictum—" * * * if a direct answer may criminate himself, then he must be the sole judge what his answer would be"—suggests an unqualified privilege to refuse to answer such a question as this. But we think there is one qualification which consists with the privilege and at the same time provides a salutary protection of the public interest in facilitating official inquiries.

The claimant of privilege must show the court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless, a contumacious assertion made in bad faith. In some circumstances, the nature of the question and the common experience of life may suffice for this purpose.⁷ But the question, "What do you do now?" is so frequently asked of witnesses as a mere identifying question that without more a court may well regard it as normally too innocent to fall within the Marshall principle. The danger may not appear sufficiently real.

In this case, the district judge in course of oral argument took the position that he could not assume appellant to be any different from any other private citizen. To him the danger that the answer would reveal more than routine identification did not appear sufficiently real. Therefore, he apparently concluded that this was a case where the burden was on the witness to offer some affirmative indication of the incriminatory possibilities of the question. Cf. *United States v. Rosen, supra*; *United States v. Weisman*,

⁷ E.g., *Alston v. State*, 109 Ala. 51, 20 So. 81 (1896) (witness asked "if he did not shoot Dean Edwards"); *People v. Spain*, 307 Ill. 283, 138 N.E. 614 (1923) (witness in bribery-conspiracy investigation asked whether he gave money to member of legislature).

supra. The witness having failed to do this, the privilege was denied him.

It is now quite apparent that the appellant could have shown beyond question that the danger was not fanciful. At the time of appellant's sentence, the district court was of the opinion that he was not entitled to bail pending appeal. Subsequently, on motion for reconsideration of the matter of bail, the applicant made allegations with respect to his reputation as a racketeer and notorious underworld figure in Philadelphia, and to newspaper articles which tended to support this reputation both generally and by specific allegation of prior conviction under the narcotics laws together with a picture of appellant with a narcotics official. This, we think, would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy.

This data was included in the record on the contempt appeal. But the government has moved to strike it on the ground that the information offered in support of the bail [fol. 41] motion was not before the court when it found appellant in contempt, and therefore cannot be considered now. We agree and disregard this data.

But, this data aside, was there enough before the district court to suggest that appellant's claim that direct answer to the question "What do you do now?" would be incriminatory was not clearly groundless.

We think that it is somewhat easier to answer this question if we remember that the court, ruling on a witness' claim of privilege against self-incrimination, is merely trying to secure some credible indication other than the word of the witness himself that the privilege is being asserted in good faith. It is certainly normally impossible without removing the privilege itself for the court to have assurance. Simply as a method of accommodating the privilege with the legitimate interest of the government in securing information, the court requires some collateral indication of the good faith of the witness. If the question is innocent on its face, it remains for the witness to call to the court's attention in some appropriate fashion such facts as point to its danger.

So far the members of the Court are in agreement. We divide in applying the discussion already had to the facts of this case. The view of the writer of this opinion is as follows: The court in this case knew the setting of

the controversy. It was a grand jury investigation of racketeering and federal crime in the vicinity. The court should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation. These considerations indicate a sufficient likelihood of good faith in the claim of privilege to sustain it.⁸

[fol. 42] The majority of the Court, however, disagrees with this conclusion. It believes that the subject-matter of the grand jury's investigation gives no notice to the trial judge of the quality of any particular witness. Many kinds of witnesses come before grand juries and there is no reason for the judge to believe, in the absence of evidence, that any particular witness is so connected with underworld activities that a statement of his occupation will tend to incriminate him. The majority thinks that the witness here failed to give the judge any information which would allow the latter to rule intelligently on the claim of privilege for the witness simply refused to say anything and gave no facts to show why he refused to say anything. Since the judge is and the witness is not the person who is to determine whether the claim of privilege is to be allowed, the majority concludes that the trial judge was right in saying that the witness had shown nothing which entitled him to the privilege which he claimed.

The judgment will be affirmed and the motion of appellee to strike certain portions of the record will be granted.

⁸ Appellant's counsel did call to the court's attention in the course of argument, although in a rather casual way, that appellant had a notorious reputation as an underworld figure. But the writer does not rely on this. See *United States v. St. Pierre*, 128 F. 2d 979, 981 (2d Cir. 1942) where Judge Frank indicates that the court "must be apprised in some more dependable manner than the mere statement of counsel, how the answer will incriminate the witness before we can allow the suppression of the truth." Nor is this a situation here which imposes upon the court a duty to take judicial notice of reputation. Cf. *Morgan, Judicial Notice*, 57 Harv. L. Rev. 269, 274-75, 279 (1944).

[fols. 43-44] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,308

UNITED STATES OF AMERICA

vs.

SAMUEL HOFFMAN, Appellant

JUDGMENT—December 8, 1950

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

Ida O. Creskoff, Clerk.

December 8, 1950.

[fol. 45] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING ON BEHALF OF APPELLANT—Filed December 21, 1950

To the Honorable, the Judges of the Said Court:

The petition of Samuel Hoffman, by his attorneys, Gray, Anderson, Schaffer & Rome, for rehearing in the above entitled case, respectfully represents as follows:

I

This Court recognized that the data furnished to the lower court "would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of [fol. 46] fear of incrimination was not mere contumacy", but on the motion of the Government struck said data from the record.

We urge this Court to permit appellant to argue before it the question of remanding the case to the lower court

for the purpose of presenting these data. If it be assumed that appellant and his counsel were in error in failing to call these data to the attention of the court below prior to his sentence, nevertheless serious constitutional questions are raised by this appeal, and consequently we pray for the opportunity to present argument to this Court in support of a remand so that appellant may present this evidence to the Court below in a motion for reconsideration of the sentence.

Appellant's error, it is now apparent from this Court's opinion, was in assuming that the court below was aware of the facts on which he relied for his claim of privilege. His Honor, Judge Hastie, disagreeing with the majority of the Court, stated that the court below knew the setting of the controversy and should have adverted to the fact that witnesses such as appellant would be summoned to testify. Appellant now seeks merely to correct his understandable error and present argument to this Court in support of this position.

Courts are always loath to find that constitutional rights have been waived. As was stated by Mr. Justice Black in *Johnson v. Zerbst*, 304 U. S. 458, 464, 82 L. ed. 1461, 1468 (1938) :

"It has been pointed out that 'courts indulge every reasonable presumption against' waiver of fundamental constitutional rights and that we 'do not presume' acquiescence in the loss of fundamental rights.' "

See also *Boyd v. United States*, 116 U. S. 616; 29 L. ed. 746, 751-752.

Appellant erroneously believed he had adequately protected his constitutional rights. He prays this Court to [fol. 47] give him the opportunity to preserve those rights by hearing argument in support of remanding the case to the court below.

II

This Court found that appellant should have answered the questions concerning the whereabouts of Weisberg. These questions were admittedly designed to aid the Government in its then futile attempts to serve a subpoena on Weisberg. Between the time of appellant's testimony and the application for bail, Weisberg voluntarily appeared. It was then assumed that these questions consequently be-

came moot since the Government did not need the answers for the conduct of its investigation. At all times thereafter it was assumed by all that the first group of questions was the main group to be considered and the Government did not even discuss the matter in its brief in this Court.

~~Appellant desires to argue before this Court the propriety of his commitment for contempt for failing to answer questions which are moot.~~

If, however, it be assumed that the questions were properly before the court, appellant asks leave to call to the attention of this Court the case of *Doram v. United States*, 181 F. 2d 489 (CA 9), in which a witness was upheld in refusing to answer similar questions on the ground of self-incrimination under Sections 371 and 1501 of the Criminal Code.

It must be remembered that prior to appellant's testifying Government counsel had advised the court that a subpoena had been issued for Weisberg and that he would seek a bench warrant. The lower court knew that appellant was aware of this because he had so testified (Appendix, 7a). We desire the opportunity to present argument to this Court that appellant should be distinguished from the [fol. 48] "considerable number of blameless people" referred to in this Court's opinion. In this connection, we invite the Court's attention to the opinion of Taft, J. (later Chief Justice) in *Ex parte Irvine*, 74 Fed. 954, wherein he quoted from Wharton on Criminal Evidence as follows (page 960):

"The question is for the discretion of the judge and, in exercising this discretion, he must be governed as much *by his personal perception of the peculiarities of the case* as by the facts actually in evidence." (Italics supplied.)

It was argued numerous times in the court below that appellant was not a man of good repute (see, for example, Supplemental Appendix, page 4a) and that court had vigorously charged the grand jury on the nature of its investigation. We think it imperative in the interest of justice that appellant be afforded the opportunity to present argument to this Court that the court below failed utterly to apply "*his personal perception of the peculiarities of the case*".

III

In the case of *Blau v. United States* decided in the Supreme Court of the United States on December 12, 1950 (19 United States Law Week 4062), the Court unanimously reversed a contempt conviction where the witness had refused to answer questions concerning the Communist Party and her employment by it. The Court said that the provisions of the Smith Act made future prosecution of petitioner far more than "a mere imaginary possibility" and went on to say:

"Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury [fol. 49] would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempts by courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning."

Appellant desires to reargue his case before this Court in the light of this most recent pronouncement of the Supreme Court. Here, Sections 371 and 1501 of the Criminal Code were "on the statute books" just as was the Smith Act. Likewise, at the time of appellant's testifying it was not only widely publicized that a subpoena had been issued for Weisberg, but also that the Government attorney had asked leave of the court below to issue a bench warrant for him.* The questions asked of appellant, therefore, reasonably could cause him to fear that criminal charges could be brought against him for violation of said sections of the criminal code.

The case of *Estes v. Potter* 180 F. 2d 865, cited in the *Blau* opinion is particularly relevant in this connection and appellant desires to argue before this Court the applicability of that case to the case at bar. The attitude of both lower courts was similar in treating this as a very simple problem

* Transcript of Proceedings on October 3, 1950 at page 72.

and in assuming that the witness was in the same category as a judge, a preacher or a member of the bar. The court in the *Estes* case said:

"* * * it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his examination; and the law never requires the doing of an idle thing."

[fol. 50] So, too, in the present case, it would have been idle merely to ask appellant when he had last seen or talked to Weisberg and to stop there. The obvious subsequent questions would lead definitely to answers which might well have incriminated appellant of a violation of the Criminal Code (Sections 371 or 1501).

Appellant believes that the decision of this Court is in conflict with that of the Fifth Circuit in the *Estes* case and prays, therefore, for leave to reargue the matter accordingly.

IV

This case was the first to come before the court below in connection with the investigation by this grand jury. It is possible that appellant and his counsel erred in failing to introduce evidence in support of appellant's claim of privilege. But it is now clear what this evidence is and we submit that appellant should be afforded the opportunity to place it upon the record in the court below.

In any event, we submit that where fundamental constitutional rights are involved, nice technicalities of procedure should not be allowed to prevail to the prejudice of an individual defendant for whose protection these constitutional safeguards were adopted.

Wherefore, appellant earnestly prays that a rehearing be granted.

Respectfully, Gray, Anderson, Schaffer & Rome;
by William A. Gray, Attorneys for Petitioner.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

William A. Gray.

[fol. 51] IN THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

ORDER DENYING REHEARING—December 27, 1950.

And Now, to wit, on December 27, 1950 after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Herbert F. Goodrich, Circuit Judge.

[File endorsement omitted.]

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 513

ORDER ALLOWING CERTIORARI—Filed March 12, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3607)